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NO. 83-1813

In The

# Supreme Court of the United States

October Term, 1983

ALVIS VANDYGRIFF, FIRST SAVINGS AND LOAN ASSOCIATION OF BOWIE, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LULING, EXCHANGE SAVINGS AND LOAN ASSOCIATION, AND MAINLAND SAVINGS AND LOAN ASSOCIATION,

*Petitioners-Defendants,*

vs.

EDWARD N. PHILLIPS,

*Respondent-Plaintiff.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## COUNTERSTATEMENT OF QUESTION PRESENTED

There is, and has been, only one dispositive issue in this case:

Whether the exclusion of the Respondent, Phillips, from employment in the savings and loan industry in Texas because of a *de facto* licensing custom of screening prospective savings and loan officers with the Texas Savings and Loan Commissioner, and refusing to hire applicants not "recommended" by the commissioner, gives rise to causes of action for violation of civil rights and interference?

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The Fifth Circuit Court of Appeals held that the exercise by the Texas Savings and Loan Commissioner of *de facto* licensing power over employment as a savings and loan association officer in Texas, pursuant to which

the Respondent, Phillips was denied employment, raised issues of violation of 42 U.S.C. §1983 and common law interference, which require trial by jury.

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## COUNTERSTATEMENT OF THE CASE

The statement of the course and disposition of proceedings below contained in Vandygriff's petition is substantially correct, and is set forth in more detail in the lower court's opinion under "B. *Procedure Below*", p. D-3, 4, Vandygriff's petition.

The Petitioners-Savings and Loan Associations' statement of the facts is a melange of inference and argument. The salient facts are set forth correctly in the lower court's opinion. See App. D, Vandygriff's petition. In view of the treatment of the facts in the Petitioners-Savings and Loan Associations' petition, a more detailed review of the facts follows.

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## STATEMENT OF FACTS

### Background

Edward N. Phillips is a resident of Longview, Texas, who graduated from North Texas State University with a BBA in 1968. R.38-39. After graduating, he worked for Longview Bank and Trust Company approximately a year and a half, R.39, 40, and then joined Longview Savings and Loan Association as Assistant Vice Presi-

dent in charge of FHA and VA lending. R.41. He remained there about a year and a half, then joined First Federal Savings and Loan Association of Marshall, Texas, as Vice President in charge of FHA and VA lending, mobile home lending, delinquent loan servicing, and secondary market operations. He was also chief appraiser. R.42. He remained there, as "No. 2" man in the association approximately five and a half years. He left to purchase a title agency. R.45. That transaction was not consummated, and he entered the real estate and apartment ownership business. R.48.

The business venture was unsuccessful, and in 1977 Phillips decided to reenter the savings and loan business. R.42. Jerry Simmons, the manager of the Sinton Service Company in Dallas, whom Phillips met in early 1977, called to inquire whether Phillips was interested in interviewing for the job of managing officer of Sinton Savings and Loan Association. R.52, 53. Phillips agreed, and a meeting was held between Phillips and a Mr. Cartwright, Chairman and majority stockholder of the Association, in July or August, 1977, R. 54. Later, Cartwright called Phillips and expressed interest in hiring him, and, in a subsequent meeting, offered Phillips employment as President of the Association. R.55-56.

Cartwright told Phillips that instructions had been given by the Savings and Loan Department to get additional capital into the Sinton Association. R.56. At a board meeting of the Association, held on August 18, 1977, R.294, Phillips was introduced to the board, and was told that there were "internal auditing" problems. R.58. But beyond that Phillips was not aware of any trouble con-

fronting the association. Phillips agreed to accept the employment. R.57.

Thereafter, Phillips was told to come to work several times, R.69, and made several trips believing that he was to go to work, but each time was given a reason why he could not go to work. R.74. He was never told that there was anything improper in the affairs of the Association, R.58, but instead was led to believe that the offer represented a good opportunity. R.59.

After being presented to the Directors, Phillips accompanied Cartwright and his attorney, Mr. Cotton, to a meeting with Commissioner Vandygriff and Deputy Commissioner Wright of the Texas Savings and Loan Department held on August 30, 1977. R.291. Phillips was introduced as the proposed new President for the Association. R.60. Neither Wright nor Vandygriff said anything to indicate that there was anything wrong regarding the Association, or that Phillips should disassociate himself from it, R.61, despite the fact that the Association had been under investigation since Cartwright bought it, R.300, the fact that Vandygriff and Wright knew of irregularities in the affairs of the Association, R.295, including misuse of funds and issuance of commitments which could not be funded, R.302-304, the fact those irregularities suggested criminal violations, and the fact that the Department had obtained a cease and desist order and an order removing Cartwright as an officer of the Association on August 15, 1977. R.292. Nor was any suggestion ever made that Phillips was not qualified to be President of the Association. R.331. Phillips was not asked about any prior association with Cartwright. R.310.

While waiting to go to work, Phillips accompanied Cartwright to New York, to try and help him raise capital for the association. R.61-62. After the return from New York, Cartwright gave Phillips an automobile to drive, and a credit card to use. R.62-68. He also co-signed a note for $5,000.00 for Phillips. R.145. Phillips was later asked to return the car and card at a time when he still believed that he was going to be President of the Association. R.68-69. During this period, he was unaware of any investigation involving the association. R.73. This was not because of lack of diligence. To the contrary, Phillips had repeatedly called Commissioner Vandygriff, to inquire as to what was going on. R.75. The Commissioner responded that he could not divulge any confidence because Phillips was not an officer, director or even an employee of the association. R.75. Finally, Vandygriff told Phillips to disassociate from the "whole mess". R. 76. Vandygriff characterized this as "fatherly advice." R.323. Phillips took the advice and told the Sinton authorities that if they ever got their problems resolved to call him. R.76.

Phillips last saw Cartwright at a meeting involving a proposed sale of the Irving Savings and Loan Association in Jan. or Feb., 1978. R.89, 700. He called Cartwright at times, and Cartwright always indicated the problems with the Association would be worked out. R.88-89. However, in October, 1978, Cartwright was indicted. R.329. Simmons was also indicted. R.325. Phillips heard about the indictments on his car radio. R.126. The Sinton Association was put into receivership. Upon hearing this Phillips contacted the FBI, to see if they wanted to talk to him for any reason. He was never even interviewed. R.128.

**Efforts to Secure Employment with Other Associations**

After Vandygriff told Phillips to disassociate from Sinton, Phillips turned his efforts in other directions. He made contacts with the Paris, North Texas, Bowie, Luling, Aztec, Exchange, and Mainland Savings and Loan Associations. In each instance, prospective employment was refused or negotiations which may have led to employment were abruptly terminated, because of a communication from Vandygriff, or someone in his office.

**Paris Savings and Loan Association**[1]

As a newly chartered association, in 1974. R.49, Paris was prepared to make Phillips an offer of employment as its managing officer, but Mr. Phillips withdrew his name from consideration. R.50. Thereafter, he maintained contact, and was involved in inquiries regarding possible sale of the Association. R.51. After the Sinton affair, Phillips again became involved in attempting to arrange a sale, with the aim of getting a job, to get back into the business.

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1 Paris Savings and Loan Association was acquitted by the jury, and judgment in its favor was upheld by the Fifth Circuit. See App. D-23, Vandygriff Pet. Aztec Savings and Loan Association was granted a summary judgment by the trial court because it was a newly chartered association, and Texas law grants the commissioner the power to approve managing officers of newly chartered associations. *op. cit.*, D-4, n. 3. Summary judgment in favor of North Texas Savings and Loan Association was affirmed, on Motion for Rehearing, by the Court of Appeals because it received information only from Wright, the Deputy Commissioner, and the jury found that Wright's imparting of information was not a cause of injury to Phillips. *op. cit.*, p. B-4. The review of the facts as to each of these associations is included in order to give a complete picture of the roles played by the parties in excluding Phillips from the industry.

With the understanding that he would be managing officer, he undertook efforts on behalf of investors consisting of Emery Dodd and William Boone and others that Phillips never met. R.96.[2] These efforts resulted in "serious" negotiations. R.99. The negotiations culminated with a trip by Phillips and Dodd to Atlanta to secure financing. Before paying the money required for a purchase money commitment, Dodd took Phillips aside and said that before paying the fee, he wanted Phillips to check with Dr. Bellamy (Paris' majority stockholder) and make sure the deal "is still on go". R.101. Phillips called Bellamy who stated that a call had been received "from Austin" and that Phillips "had problems" with the Savings and Loan Department. R.189. Bellamy said: "Let's talk before you do anything." R.102. This terminated the meeting in Atlanta. R.102. After his return to Texas, Phillips talked to Bellamy, who stated he had no desire to pursue the sale of the association, through Phillips, with anyone. R.105. Bellamy said Phillips was not in good standing with "Austin", R. 102-105, and that Vandygriff would be "too difficult" on the owners if the deal were consummated with Phillips involved. R.270. Therefore, Bellamy said he wanted to discontinue negotiations and contact, and disassociate himself from Phillips. The only reason given by Bellamy for this action was what had been told him "by Austin". R.105.

Bellamy testified that information that Phillips was "not in good standing" with the Department was obtained from Tommy Johnson, Paris' President, who got the information in a conversation with Vandygriff. R.572-3.

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2 Phillips was engaged in a property development joint venture with Boone and Dodd.

Johnson testified he either talked to Vandygriff or Wright and was told the deal would have a "hard time" getting approved if Phillips were involved. R. 862, 872. Vandygriff denied knowledge of any communication with Paris about Phillips. R.337.

**First Savings of Bowie**

Phillips first talked to Bowie representatives about a job as managing officer. R.90. The conversations evolved into the prospect of the Dodd-Boone group buying the association. R.91. Thereafter, Phillips' efforts were aimed at consummating a sale, which would have resulted in him becoming the managing officer. R.91-92, 96.

A meeting to discuss the possible sale was held in the offices of Homer Caston, attorney for the association. R. 92. Two or two and a half times book value was mentioned as a basis for the price of the stock. R.92. Dodd and Boone were agreeable to the price. R.92. But after the meeting, Caston called Phillips and stated that he had talked to the "regulatory agent" or "authorities" and that negotiations would have to be terminated. R.95. Caston related that he had talked to "the people in Austin" and that Phillips had problems in his relations with them and in view of the "problems" he could not advise his clients to continue to negotiate. R.95.

**North Texas Savings and Loan Association**

Phillips interviewed Mr. Snider with North Texas, in Denton, Texas, for the "No. 2" (vice-president) position. R.104-106. The association was a little smaller than First Federal of Marshall, which Phillips had previously served

as "No. 2" man. R.106. Snider said he would check Phillips' references and get back to him. R.105. Phillips contacted Snider when he had not heard from him for approximately a week or ten days. R.107. Snider stated that the association had not hired anyone. He also said he had talked to someone in Austin, or the "agency" in Austin, and that Phillips had some "problems" with them that would prohibit them from pursuing any further discussion. R.107.

Snider admitted that he was impressed with Phillips, and had a good visit with him. R.451. (Phillips had played basketball at North Texas State University, located in Denton. R.451.) He also admitted calling Deputy Commissioner Wright, and claimed Wright indicated Phillips was falsely claiming to be a friend of either Vandygriff or Wright which caused him "doubt" about Phillips. R.453-4; 478-483. (Phillips denied this.) Snider denied the other statements, claimed by Phillips, but admitted he did not follow-up outstanding calls to Phillips' references after talking to Wright. R.453.

**First Federal Savings and Loan Association of Luling**

Phillips interviewed First Federal in Luling as a result of an appointment secured by Mrs. Margaret Cashin,[3] who operates an executive placement service for prospective savings and loan officers. R.107-108. Mr. Zahnow, who was in charge of the search for the officer for the association, was very optimistic about Phillips' chances for the job. R.110. When Phillips did not hear from the association

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3 To add a touch of irony, it was Vandygriff who referred Mr. Phillips to Cashin and Associates. R.107-8.

again, he was informed by Mrs. Cashin that the association had decided to go with someone who was "heavier in accounting." R.110.

Mr. Zahnow admitted contacting Vandygriff about Phillips, and made notes of the conversation, which occurred on November 2, 1978. R.423. According to the notes, Vandygriff stated that he certainly would not recommend Mr. Phillips be hired if Luling had been a "state charter." R.404. Vandygriff indicated Phillips had fallen into "bad company" including Cartwright, Cotton, and perhaps "Henderson", though perhaps through no fault of his own, and that "two were indicted." R.405-406.

Among the notes made by Mr. Zahnow during the conversation with Vandygriff were "Sinton S & L"; bad company by association," "not approve as manager of a state," "attempting to buy association," and "a friend has been indicted". R.425-428.

Zahnow conceded that what Vandygriff said did affect Luling's evaluation of Phillips, ("to a very small degree" R.434) and certainly "didn't help Mr. Phillips." R.437-438. In his deposition, Vandygriff denied that he had talked to Zahnow about Phillips, but at trial admitted he did "if Zahnow says so." R.334-335.

**Aztec Savings and Loan Association**

Mrs. Cashin also arranged an interview for Phillips with Aztec, which was a newly cartered association, R.110-111; as a result of the interview, Phillips was offered a job at a salary of $18,000.00, plus a car and expenses and "benefits." R.113. He was asked to report to work the

following Monday. R.113. Phillips accepted. R.113. The following day, however, Mr. Cummings, who had hired him, called Phillips at 8:45 in the morning. In the conversation, Cummings did not state that he had talked to the Commissioner. Instead he was vague and said something to the effect that someone had been found who might fit the association's criteria better than Phillips. R.114. This precipitated a meeting between Mr. Phillips and Vandygriff, R.114. In the meeting Vandygriff acknowledged that he had talked about Phillips to Cummings. R.120.

In trial testimony, Cummings verified that he called the Commissioner who indicated that he would not approve Phillips to be a managing officer. R.492. Vandygriff gave no reason why he would not recommend Mr. Phillips. R.494. Phillips was removed from consideration for employment because of Vandygriff's indication of disapproval. R.493. Vandygriff said he told Cummings Phillips was "not qualified."

**Conversation with Vandygriff**

Within 30 minutes after receiving the call from Cummings, Phillips called Vandygriff. He told the Commissioner about the call from Cummings, R.114, and said that he wanted to discuss it. At that point, Vandygriff said: "Ed, I can't approve you for anything in the State of Texas—in the savings and loan business in the State of Texas as long as you're continuing to associate with . . ." and he named Cartwright, Taylor, and a man named Herman Beebee. R.114. Phillips responded that he was not associated with the people named and did not even know one of them (Beebee). Vandygriff suggested a meeting, and told Phillips to bring his resume. R.113, R.116.

The meeting was held on Nov. 7, 1978. R.116, 206, 311, 325. During the discussion, Vandygriff said he was getting reports that Phillips was associated with Cartwright, Taylor, and Beebee and was maintaining a continuing association with the people involved in Sinton. R.117. He again stated that he couldn't approve Phillips for anything in the savings and loan business. R.117. Vandygriff even said he had gotten a report that Phillips was running around on his wife before he got a divorce, which Phillips also denied. R.117. Phillips asked what that had to do with his qualifications, and Vandygriff refused further comment. R.118. Phillips told Vandygriff that he had met Taylor only once, had never met Beebee, and had no continuing association with Cartwright. R.117-118.

Wright was in attendance only during the first half of the meeting. Wright objected to the use of his name, but Phillips stated that he had not used his name, and had not used either Vandygriff or Wright as a reference. R.121-122.

Vandygriff seemed cordial and receptive. At the conclusion of the meeting he stated that Phillips had convinced him that Phillips did not have an ongoing association with Cartwright and Taylor and did not know Beebee. R.116-117. Vandygriff, who testified he "believed" what Phillips said, also stated that there was a need for young, qualified men such as Phillips in the industry, that he hoped Phillips would get back in the industry, and that he (Vandygriff) was not going to stand in Phillips' way. R.117; 349. When Phillips asked "What about Deputy Wright?" Vandygriff replied "I don't know, that's up to him, you will have to convince him separately, that's his

business." R.120. Despite this slightly ominous farewell note, Phillips believed his troubles were over. He was wrong. Vandygriff did not keep his word.

**Exchange Savings Association**

Phillips applied for employment with Exchange after his conversation with Vandygriff. R.123. He talked to Mr. Hall, R.123, and made a full disclosure of the problems he had encountered with Sinton, the other savings and loan associations, and Vandygriff. R.125; 497. Hall indicated that he and "Alvis" (Vandygriff) were personal friends, and expressed confidence he could get accurate information about Phillips' status. Later, Hall told Phillips that he had talked to the "regulatory agency", that Phillips did have problems, and that he (Hall) felt it best that Phillips let time pass before attempting to reestablish himself in the industry. R.124.

Hall said this was the only time in his career something like this had happened. R.516. He confirmed that he had "visited" with Vandygriff relating to Phillips. R.504. Hall told Vandygriff that Phillips had contacted Exchange, had stated he was having difficulty getting back into the savings and loan business, and felt his problem related to "Sinton." R.522. Hall could not remember Vandygriff's response. R.523. He denied Vandygriff said either that Phillips did or did not have a problem. R.523. Vandygriff said he "didn't recall" the conversation with Hall. R.340.

**Mainland Savings and Loan Association**

Phillips also interviewed Raymond Hill with Mainland atfer the conversation with Vanydgriff. R. 131. Phillips

told Hill about the problems involving Vandygriff, Sinton, and securing a job. R.132. At the conclusion, Hill stated that he was impressed with Phillips' qualifications, education, etc., and that if things checked out and if there was no problem with the Commissioner, he felt that "something could be worked out" (regarding employment). R.133. Two or three days later Hill called Phillips in the evening and stated that he had talked to "Austin" and said: "Ed, they are not going to let you back in the savings and loan business in Texas," R.133, because of "the Sinton thing."

**Industry "Custom"**

Wright (former deputy commissioner) testified that it is customary in the savings and loan industry in Texas for associations considering employment of managerial personnel to contact the commissioner's office and make inquiry about the applicant. R.638-640. Bellamy (Paris) testified it is customary to "screen" applicants for managerial positions with the Commissioner, R.581, as a "courtesy" because the savings and loan department "can be of great help." R.623. Phillips said it is the custom in the industry for the Savings and Loan Commissioner to "screen" top management, R.122-123, and that he never saw a decision made as to a prospective officer without this being done. Snider (North Texas) said that if Vandygriff or the Savings and Loan Department would not "recommend" a person, that person would not be considered for employment. R.469. John Hall, Jr. (Irving Savings and Loan), stated there is a definite custom of screening an applicant for a managerial job with the Commissioner, and receiving the Commissioner's approval, before hiring the applicant. R.701.

Vandygriff admitted that he has no "jurisdiction" over who is hired by a savings and loan association, except in the instance of a proposed managing officer of a newly chartered association, who must be approved "as qualified" by the commissioner, R.332; but there was no direct refutation of the existence of the custom.

**Legality of "Custom"**

The vice in the "custom" is that it has no legal sanction.[4] Only in one instance does the Department have authority to review or approve the hiring of a savings and loan officer. Article 852A, Sec. 2.01A, V.A.C.S., enacted in 1969, says in pertinent part:

> "... No new association shall commence business without having first presented to the commissioner the name and qualifications of its proposed managing officer, and until that managing officer is approved as qualified by the commissioner."[5]

The power of approval is limited to determining, by objective criteria, that the applicant is "qualified." Reg. 1.11, *Savings and Loan Department Regulations;* R.290. Although Vandygriff contended that he never tried to exercise such power or jurisdiction, but only told new associations if applicants for managing officer's jobs were qualified, R.332, the proof is irrefutable that the commissioner has aggrandized power by "custom" pursuant to which savings and loan associations in Texas have

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4 Any law permitting the arbitrary foreclosure of a person or class from employment in a regulated industry by a state agent would be subject to constitutional attack. See discussion *infra.*

5 Aztec was a newly chartered association obliged to comply with this statute. That is why no appeal was taken as to Aztec.

vested in him the ability to effectively "blacklist" any prospective savings and loan officer he chooses, and that this "blacklist" power was applied to Phillips.

**Blacklist**

Ironically, some of the most graphic testimony of the blacklisting of Phillips came from Vandygriff's long time friend, Margaret Cashin, to whom Vandygriff referred Phillips. R.551. Mrs. Cashin considered Mr. Phillips "very marketable". R.545. When she sent him on the job interviews at Aztec and Luling, she had not talked with Vandygriff about Phillips. R.543. After the Aztec and Luding interviews, Mrs. Cashion found out about Mr. Phillips' "Sinton problem", R.536, her best recollection being that she found out from Vandygriff. R.537. She at first testified that Vandygriff had told her he would not recommend Mr. Phillips for a managing officer's job, but would approve him as a second man. R.536. On cross-examination, it was developed that when she attempted to send Phillips on the next interview (after Aztec and Luling), Phillips told her she had better check with Vandygriff because he had been having considerable problems trying to get a job. R.539. Pressed, she said she "may" have talked to Vandygriff again, R.539, but said she did not recall whether, after the second conversation, she told Phillips that Vandygriff did not want Phillips to have *any* job in the savings and loan business in Texas. R.540. She was then informed that this conversation with Mr. Phillips had been recorded. R.540. After seeing a transcript of the recording, Mrs. Cashin acknowledged that Vandygriff had said of Mr. Phillips "I just wouldn't rec-

ommend him for anything," and "I just can't recommend him." R.543-545; 547, 549. She also acknowledged that she told Phillips she did not see anything that could be done about the problem. R.546.

After this conversation Mrs. Cashin did not send Phillips on any other interviews with any savings and loan associations in Texas, R.550, and said that she would "think" that Phillips was unemployable in Texas. R.551. The reason she did not send Mr. Phillips on any more interviews in Texas was because she knew Vandygriff "had him blocked." R.554. She said that the only reason that she knew that Mr. Phillips could not get a job in the savings and loan business in Texas was because Vandygriff and the Savings and Loan Department "had him blocked", R.555, and the only reason Vandygriff gave for blocking him was his "involvement" with "Sinton." R.555. Although Vandygriff had testified he made no such statements, R.335, he said he would not deny telling Mrs. Cashin he would not approve Phillips for "anything" in the industry. R.379.

John Hall gave similar testimony. Mr. Hall first met Phillips in 1977 when Phillips introduced Dodd-Boone as prospective purchasers for the Irving Savings and Loan Association, which Mr. Hall headed. R. 693. In early 1978, Phillips referred a Dr. Griffin as a prospective purchaser for the association. R.700-701. Griffin asked the procedure to make a management change, in the event the sale was consummated. Mr. Hall told him that it was a "ritual" to go to Austin, let "Austin" know who the top officer is to be, and see if they disagree. Griffin asked Hall to call Austin about Phillips. R.701.

Mr. Hall then called Vandygriff, who said that Phillips would not be approved to be employed by any savings and loan association in Texas because of the Sinton matter and his association with Cartwright. When Hall directly inquired about the extent of Phillips' involvement, Vandygriff said that Phillips had not been indicted, and was not even being investigated. Further, Vandygriff said he did not expect any investigation or indictment of Phillips, and that to Vandygriff's knowledge Phillips was not involved in any of Sinton's commitments (from which Sinton's troubles and indictments stemmed). But Vandygriff said that Sinton was a "tangled mess", "they" did not know what the situation at Sinton was, and that he could not ever approve Phillips to be employed in the savings and loan industry in Texas. R.702-704.

**Sinton "Stigma"**

The Sinton affair, and subsequent criminal convictions connected with it, became widely known in the savings and loan industry. R.143. Phillips stated that an implication by the Commissioner that he was "mixed up" or had continuing involvement with Sinton or Cartwright would attach a stigma to him in the industry. R.143. This stigma would negate his ability to get a job. R.143. Further, Phillips said that he would not be hired in the industry if the Commissioner did not want him hired, for whatever reason. R.143. Phillips stated that he was made to appear to share the guilt of wrongdoing in connection with Sinton, even though he was not guilty R.144, was never paid by Sinton, never went to work for them, R.144, and even though he lost expenses while awaiting employment. R.144. Vandygriff testified there is an ef-

fective industry "grapevine", that the Sinton matter obtained widespread publicity, and that people in the industry know who is applying for jobs, and where applications are being made. R.330. He also admitted that the implication of association with Cartwright and Sinton would attach a stigma to a person in the industry. R.380.

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## REASONS FOR DENYING CERTIORARI

### I. The Court of Appeals Correctly Analyzed And Applied Settled Principles Of Law In Holding That The Facts Present A Cause Of Action Under The Fourteenth Amendment.

The decision of the Court of Appeals reflects a clear and reasoned application of well-settled principles. It has repeatedly been acknowledged that a person has a liberty interest in pursuing an occupation. *Truax v. Raich,* 239 U.S. 33 (1915); see also *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238-39 (1957); *Greene v. McElroy,* 360 U.S. 474, 492 (1959); *Board of Regents v. Roth,* 408 U.S. 564, 573-74 (1972); *Ferrel v. Dallas Independent School District,* 392 F.2d 697, 707 (5th Cir. 1968); *Shaw v. Hospital Authority,* 507 F.2d 625, 628 (5th Cir. 1975); *Daly v. Sprague,* 675 F.2d 716, 727 (5th Cir. 1982).

Phillips was excluded from employment in Texas as a managing officer of a savings and loan association. Under the foregoing cases, it is clear that Phillips' interest in that occupation is a liberty interest within the ambient of the Fourteenth Amendment.

It is equally clear that Phillips was deprived of that liberty interest without due process of law through a custom of *de facto* licensing which is actionable under the Fourteenth Amendment. No party to the lawsuit ever contended that procedural protections of the Fourteenth Amendment were provided.

The evidence shows that the Petitioners-Savings and Loan Associations were willful participants in the industry custom of *de facto* licensing. This participation subjects them to liability, along with the savings and loan commissioner. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970).

## II. The Holding Of The Court Of Appeals That The Petitioners-Defendants May Be Held Liable For Interference Is Correct.

Texas law provides a cause of action for tortious interference with prospective contractual relations.

> For a plaintiff . . . to prevail, he must show that (1) there was a "reasonable probability" that he would have entered into a contractual relationship; (2) defendant acted maliciously by intentionally preventing the relationship from occurring with the purpose of harming plaintiff; (3) the defendant was not privileged or justified, and (4) actual harm or damage occurred as a result.

*Leonard Duckworth, Inc. v. Michael L. Field & Co.*, 516 F.2d 952, 956 (5th Cir. 1975) (Texas law). See also *Verkin v. Melroy*, 699 F. 2d 729 (5th Cir. 1983) (same).

The Court of Appeals' decision correctly holds that the evidence raises an issue of tortious interference by

Vandygriff, for which the savings and loan associations may also be liable, vicariously, by participating in the custom. See, e.g., *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854 (Tex. 1968); *International Bankers Life Insurance Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963); *Bourland v. Texas*, 528 S.W. 2d 350 (Tex. Civ. App. 1975, writ ref. n.r.e.).

### III. The Holding Of The Court Of Appeals Is Not In Conflict With Any Decision Of This Court Or The Courts Of Appeals.

The Petitioners have failed to demonstrate that the holdings of the Court of Appeals are in conflict with any decision of this Court or any other Court of Appeals. Nor have they demonstrated that the lower court incorrectly analyzed or applied any applicable authority. Instead, Petitioners attempt to justify the improper custom, and defend their participation in it. The custom is without justification. Participation in a practice which controls the determination of persons who shall serve as managing officers of Texas savings and loan associations, without authority of law and without due process, cannot be defended.

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## CONCLUSION

Petitioners have failed to demonstrate any significant issue justifying the issuance of a Writ of Certiorari. The Court of Appeals applied well-settled civil rights and in-

terference principles in analyzing and deciding the case, and returning it for trial. For these reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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